

# ARIZONA TRIBAL ENERGY ASSOCIATION

*Submitted by e-mail to Post2017BCP@wapa.gov*

January 29, 2010

Mr. Darrick Moe  
Desert Southwest Regional Manager  
Western Area Power Administration  
P.O. Box 6457  
Phoenix, AZ 85005-6457

**RE: Comments of the Arizona Tribal Energy Association on the Boulder Canyon Project – Post 2017 Application of the Energy Planning and Management Program Power Marketing Initiative Federal Register Notice of November 20, 2009**

Dear Mr. Moe:

The following represent the public comment submission of the Arizona Tribal Energy Association (“ATEA”) in response to Western’s call for the same in its Federal Register Notice of November 20, 2009 regarding the Boulder Canyon Project. ATEA is currently comprised of Ak-Chin Energy Services, the Gila River Indian Community Utility Authority, the Tohono O’odham Utility Authority and the Yavapai-Apache Nation; Aha Macav Power Service is also presently a member but will submit comments separately.

ATEA addresses Western’s expressly noted areas for comment in turn below and sets out its additional comments thereafter.

**1. Application of the Power Marketing Initiative to the Boulder Canyon Project**

ATEA considers the Power Marketing Initiative (“PMI”) to apply to the Boulder Canyon Project as current legal authority does not preclude the same and Western has applied this protocol to all other Federal power projects since its implementation in 1995.

Section 617d(b) of Title 43 of the U.S. Code provides that “the holder of any [Hoover power] contract for electrical energy not in default . . . shall be entitled to a renewal . . . upon such terms and conditions *as may be authorized or required under the then existing laws and regulations . . .*” [emphasis added]. ATEA considers this language to expressly provide for Western’s regulatory action at the time current contracts expire; as the PMI was a purely regulatory action by the agency, its application to Hoover does not conflict

with other relevant, existing legal authority. Furthermore, the PMI expressly protects pre-existing contractors, ensuring that any action by Western to apply the PMI is consistent with the renewal provision set out in Federal law.

ATEA considers the intent behind the PMI to support equitable distribution of this public resource and to confirm that such must be redefined through periodic resource reallocation as communities within the service area change over time. In the absence of the PMI, ATEA questions what approach Western would utilize in allocating the resource as of October 1, 2017. In the absence of the PMI or any new tribal customer allowance, ATEA's members might consider asserting independent claims to Project power prior or in response to such an action.

## 2. Quantity of Resources Extended to Existing Customers

ATEA asserts that the application of the PMI can be accomplished consistent with its purpose of assuring the provision of future resource planning stability to existing customers. ATEA asserts that the PMI application can achieve this assurance while only renewing a 90% share of the current allocations otherwise expiring in September 2017. Western's current proposal is too extreme in its protection of currently contracted shares as against the interests of potential new contractors, especially Federally-recognized Native American governments with lands within the Project service area.

In addition, ATEA is not persuaded that the quantities of energy and capacity set out in Western's proposal meet the equitable redistribution mandate of the PMI. The disparately impacted economic interests of new tribal customers and their members outweigh the need to almost completely insulate existing customers in a reallocation process.

## 3. Size of Proposed Resource Pool

The quantity of the resources extended to new tribal customers should equal 10% of the total Project energy and capacity output. Such a total is on par with the share offered new tribal customers in other Western projects involving tribes as new customers. A 10% "tribal pool" is necessary to address proportionately larger economic impacts of current regional economic conditions and the significant number of tribes in the Project service area in comparison to other Western preference customers similarly located. This share is also consistent with Western's practices in allocating a portion of output from other projects, as was done initially for Pick-Sloan, based at least in part on projected tribal needs.

## 4. Excess Energy Provisions

New tribal customers should receive an option to purchase any excess energy available during any calendar year in proportion to their share of power or at least on the same proportionate basis as that made available to existing customers.

## 5. Term of Contracts

ATEA supports the creation of at least 30-year contracts in the 2017 reallocation. The Act only provides for a 50-year term limitation, being otherwise silent as to a specifically required term. [See 43 U.S.C. Section 617d(a)]

## 6. Additional Comments

a. Consistent with current U.S. Department of Energy Native American policy, Western must maintain a government-to-government relationship with Federally-recognized Native American governments. On this basis ATEA rejects the notion that any new tribal customer with lands inside the boundaries of Arizona or Nevada should be required to receive its allocation through the Arizona Power Authority (“APA”) or Colorado River Commission of Nevada (“CRC”), respectively.

In addition, neither Federal nor Arizona legal authority vests in the APA any express authority to contract with tribes for this purpose and the State of Arizona also lacks any general authority to require the same. Western has not previously required tribes to contract for preference power directly through non-Federal governmental agencies. While ATEA does not desire to limit any tribe wishing to engage itself with one or more of these states or their power distribution entities, ATEA asserts that Western has no authority to require receipt of tribal allocations through the APA or CRC.

Furthermore, language in the Act is silent as to tribes. Federal Indian law including statutes and court rulings since 1928, the year of the original language governing Hoover, includes authority recognizing significant limits on state jurisdiction over tribal interests. These actions affirm that only Congress, acting specifically and affirmatively, can limit tribal governmental or regulatory authority. Even in cases involving state versus tribal authority over non-Indians on Indian lands, the U.S. Supreme Court has held that state authority does not apply when it interferes with tribal self-government. As Western’s conveyance of hydroelectric power to tribes from other Federal public power projects has consistently recognized and supported tribal self-government, tribal receipt of power from Hoover must be accomplished in the same manner.

Also, the Act of 1928 and the amendments that have followed presage an evolution of tribes as utility market participants. Federal law and policy have consistently sought to reinforce the progress of tribes as self-governing and with sufficient capacity to address their own needs. Western’s execution of other power contracts with tribes to date were intended to and have furthered tribal utility capability increases; to now require tribes to revert to state authority in Arizona or Nevada in conjunction with Hoover only would be wholly inconsistent with those notions, violating overarching Federal policy applicable to all Federal agencies in their government-to-government dealings with the nation’s tribal interests.

Finally, Arizona has never asserted general jurisdiction over tribes within its boundaries. Instead, Arizona rejected assumption of this authority when it declined to adopt the same

through Public Law 280, a Federal statute affording states broader authority over tribes for certain purposes.

b. ATEA urges Western to extend the deadline for this comment process to ensure that all tribes in the Hoover service area will have sufficient time to become familiar with the reallocation and submit comments supporting their interests. At present, ATEA believes that few tribes in the Project service area are even aware of the potential to obtain Hoover in 2017 and therefore have no knowledge of this first stage of the process to reallocate Project output, despite its potentially significant impact on their future Hoover contracting opportunities.

Furthermore, as noted in Western's "December 2009 PIF Q and A," distributed by Western on January 15, 2010, Western itself has even yet to specifically identify all tribes within the Project marketing area, despite requests for the same more than one year ago by tribal interests.

ATEA appreciates the opportunity to submit these comments in furtherance of its members' desire to obtain some portion of hydroelectric power generated through the Boulder Canyon Project; ATEA also supports the comments submitted by the Inter Tribal Council of Arizona and other tribal interests.

Thank you for your attention.

Sincerely,

***Leonard Gold***

Leonard S. Gold  
President

cc: Shan Lewis, President, Inter Tribal Council of Arizona